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No. 86-1402

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KENNETH S. CAMERON,

Petitioner,

—v.—

MATTHEW FOGARTY and JOHN HALBIG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases: PAGE

Dunaway v. *New York*, 442 U.S. 200 (1979) 2

Morales v. *New York*, 396 U.S. 102 (1969)..... 2

United States v. *Lovasco*, 431 U.S. 783 (1977) 2

Statute:

42 U.S.C. § 1983 (1981).....*passim*

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In Point I of the opposition brief, respondents acknowledge that the Circuits have expressed conflicting views as to whether the common law tort bar to false arrest suits precludes a federal action for a civil rights violation under 42 U.S.C. § 1983. That conflict provides a compelling ground for granting the writ.

The balance of Point I is devoted to the contention that the common law bar is consistent with the civil rights statute. That position is without merit as demonstrated in our petition (at 3).

In Point II of the opposition brief, respondents claim that they had probable cause to arrest petitioner. That claim is legally irrelevant because the Second Circuit held that peti-

tioner had no right to pursue his § 1983 claim even if there was no probable cause (Petition at 10a, 11a, 13a, 15a, 19a, 20a). The Second Circuit's opinion was based on the specific assumption that a federal civil rights action is not allowed where there is *no* probable cause.

Moreover, the court below did not make any findings on the issue of probable cause, an issue which the Second Circuit regarded as immaterial.

This Court has repeatedly stated that "[a]bsent exceptional circumstances" it will not review issues raised for the first time before the Supreme Court. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783 (1977). Respondents have not alleged that such "exceptional" circumstances are present here.

Even after deciding to hear a case, this Court will not consider the issue of probable cause when it lacks a full record below. As the Court wrote:

> [I]n the absence of a record that squarely and necessarily presents the issue and fully illuminates the factual context in which the question arises, we choose not to grapple with the question of the legality of custodial questioning . . . .

Morales v. *New York*, 396 U.S. 102, 105-06 (1969). Here, the record below does not "fully illuminate" the facts as to probable cause, which the Second Circuit regarded as irrelevant.

In belatedly raising the issue of probable cause, respondents mischaracterize the record by claiming that they merely "detain[ed] petitioner for initial questioning and for further investigation" (Opposition brief at 15, 17). Respondents thus are apparently attempting to invoke a lesser standard than is required for an arrest. But this Court has held that custodial questioning cannot be based on "less than probable cause for a full-fledged arrest." *Dunaway* v. *New York*, 442 U.S. 200 (1979).

Conclusion

For the reasons set forth in the petition and for the foregoing reasons, petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

April 7, 1987

Respectfully submitted,

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